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In The

Supreme Court of the United States

October Term, 1992

DONNA E. SHALALA, Secretary of Health and Human Services,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE NOSSCR..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT

I. The language and purpose of the Equal Access to Justice Act make this fee application timely 3

II. Congress gave the district courts extensive jurisdiction in Social Security cases..... 4

III. The realities of Social Security litigation should be kept in mind..... 5

IV. The Secretary does not always comply with court remand orders..... 8

V. District courts have jurisdiction to enter "final judgments" after the agency completes its remand proceedings..... 10

A. Historically district courts in Social Security cases have retained jurisdiction during all remands, with the full agreement of the Secretary, and have employed simple procedures to review the merits a second time if necessary..... 11

B. The general rule of administrative law is that courts remanding to an agency retain jurisdiction over the case..... 13

C. The language of § 405(g) does not prevent the district court from retaining jurisdiction to enter a final judgment after "fourth-sentence" remand proceedings are finished..... 14

TABLE OF CONTENTS – Continued

Page

D. Another section of the Social Security Act requires a post-remand judgment for its proper operation 18

VI. There is no clear distinction between fourth- and sixth-sentence remands 19

VII. More than one "final judgment" can be entered in a civil action..... 22

VIII. The Secretary's grant of benefits to Mr. Schaefer on remand was a "settlement" upon which the district court could enter an order..... 25

IX. This Court's decision in *Sullivan v. Finkelstein* did not hold that all remands under sentence four are immediately appealable as "final decisions," nor that the district court forfeits all jurisdiction at that time 25

CONCLUSION 30

STATUTORY APPENDIX.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Heckler, 612 F. Supp 272 (D.R.I. 1985) .17, 22

Angevine v. Sullivan, 881 F.2d 519 (7th Cir. 1989) 10

Avery v. Secretary of HHS, 762 F.2d 158 (1st Cir. 1985)..... 11

Bell v. Bowen, 658 F. Supp. 533 (C.D. Ill. 1987)..... 6

Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967)..... 26

Bowen v. City of New York, 476 U.S. (1986)..... 24

Brown v. Secretary of HHS, 747 F.2d 878 (3d Cir. 1984).....11, 29

Catlin v. United States, 324 U.S. 229 (1945)..... 26

Cobbledick v. United States, 309 U.S. 323 (1940)..... 27

Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987) 23

Cummings v. Sullivan, 950 F.2d 492 (7th Cir. 1991) 20

Damato v. Sullivan, 945 F.2d 982 (7th Cir. 1991)..... 20

Davis v. Secretary of HHS, 634 F. Supp 174 (E.D. Mich. 1986).....9, 10

Druid Hills Civic Ass'n v. Federal Highway Administration 833 F.2d 1545 (11th Cir. 1987)..... 13

Estho v. Lear, 7 Pet. 130 (U.S. 1833) 13

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 29

Ford Motor Company v. NLRB, 305 U.S. 364 (1939) ..5, 13

Frizzell v. Sullivan, 927 F.2d 254 (5th Cir. 1991)..... 7

TABLE OF AUTHORITIES – Continued

Page

Haire v. Bowen, No. C-82-350-M (W.D.N.C., Charlotte Div. February 28, 1986) 8

Hensley v. Eckerhart, 461 U.S. 424 (1983) 22

Hinton v. Sullivan, No. 84 Civ. 9276 (CES), 1991 U.S. District LEXIS 8915 (S.D.N.Y. July 2, 1991) 9

Holst v. Bowen, 637 F. Supp. 145 (E.D. Wash. 1986) 9

Key v. Sullivan, 925 F.2d 1056 (7th Cir. 1991) .. 9, 10, 21

Lucena v. Secretary of HHS, 601 F. Supp. 168 (D.P.R. 1985) 9

McDonald v. Sullivan, 884 F.2d 1468 (1st Cir. 1989) 25

McKeever v. Heckler, 595 F. Supp. 1131 (E.D. Wis. 1984) 8

Mefford v. Gardner, 383 F.2d 748 (6th Cir. 1967) 9

Melkonyan v. Sullivan, 111 S.Ct. 2157 (1991) ..... *passim*

Milazzo v. Schweiker, 562 F. Supp. 1 (E.D. Pa. 1983) 9

Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399 (5th Cir. 1984) 26

Petition of Thomason, 777 F. Supp. 1277 (D.S.C. 1991) 20

Pierce v. Underwood, 487 U.S. 552 (1988) 5

Pirus v. Bowen, 869 F.2d 536 (9th Cir. 1989) 25

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 17

Ramos v. Secretary of HEW, 373 F. Supp. 260 (D.P.R. 1976) 9

Reed v. Secretary of HHS, 804 F. Supp 914 (E.D. Mich. 1992) 6

TABLE OF AUTHORITIES – Continued

Page

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1955) 23

Seatrain Shipbuilding Corp. v. Shell Oil Corp., 444 U.S. 572 (1989) 23

Skelton v. Bowen, 668 F. Supp. 629 (N.D. Ohio 1987) 9

Sullivan v. Finkelstein, 496 U.S. 617 (1990) ..... *passim*

Sullivan v. Hudson, 490 U.S. 877 (1989) ..... *passim*

Timberlake v. Oppenheimer & Co., Inc., 729 F.2d 515 (7th Cir. 1984) 23

Valdez v. Schweiker, 575 F. Supp. 1203 (D. Colo. 1983) 9

White v. New Hampshire Department of Employment Security, 455 U.S. 696 (1974) 22

Wilson v. Heckler, 609 F. Supp. 120 (W.D. Mo. 1985) 7, 11, 12, 29

STATUTES

28 U.S.C. § 1291 ..... 23, 24

28 U.S.C. § 2412(d) 1, 3, 25

42 U.S.C. § 405(g); 53 Stat. 1362, 1368 ..... *passim*

42 U.S.C. § 406(b) 18

42 U.S.C. § 421(h) 20

42 U.S.C. § 423(d)(5)(B) 20

REGULATIONS

20 C.F.R. § 404.951 20

20 C.F.R. § 404.952 15

TABLE OF AUTHORITIES – Continued

Page

20 C.F.R. § 404.970 20

20 C.F.R. § 404.983 10

20 C.F.R. § 404.984 ..... 10, 11

MISCELLANEOUS LEGISLATIVE MATERIALS

54 Fed. Reg. 37791 (September 13, 1989) 11

Fed R. Civ. P. 54(b) 23

H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939) 18

H.R. Rep. No. 96-100, 96 Cong., 1st Sess. 13 (1979) 21

S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939) 18

Pub. L. No. 96-265, § 307, 94 Stat. 441 (June 9, 1980) 21

Pub. L. No. 98-460, § 2(d)(4), 98 Stat. 1794 15

MISCELLANEOUS

Webster's Ninth New Collegiate Dictionary 1355 (Merriam-Webster, 1988) 14

1992 Social Sec. Admin. Rep. to Congress 31 5

INTEREST OF AMICUS CURIAE NOSSCR

The National Organization of Social Security Claimants' Representatives ("NOSSCR") is a non-profit corporation. Most of our members are attorneys who regularly represent people claiming disability benefits in administrative proceedings before the Social Security Administration of the U.S. Department of Health and Human Services ("HHS").

Our members often file actions in federal court against the Secretary of HHS ("the Secretary" or "the agency"), appealing final administrative denials of benefit claims. Such civil actions are filed under the judicial review section of the Social Security Act, 42 U.S.C. § 405(g).

Where the civil action leads to an award of benefits, and it appears that the agency acted unreasonably in denying the claim, our members often file applications in court to shift the burden of attorney fees from the disabled claimant to the agency under the Equal Access to Justice Act ("EAJA"). 28 U.S.C. § 2412(d).

Our members and their clients want to keep the EAJA application process simple and fair, without "traps for the unwary." Our disabled clients who need access to the courts to challenge unreasonable denials of their claims should not have to jump extra procedural hurdles in order to be made whole under the EAJA. Thus we oppose the agency's suggestion that claimants must file premature "protective" fee applications before they win their claims.

Hundreds of our disabled clients are threatened by the retrospective trap that the agency seeks to spring in this case. The agency is opposing meritorious EAJA applications on timeliness grounds, using the theory that

the EAJA applications should have been filed at the time of court remand orders. The agency and everyone else previously considered these orders to be interlocutory.

Beyond the EAJA fee question, NOSSCR is interested in a larger issue: preserving the stable structure of judicial review under 42 U.S.C. § 405(g). The existing straightforward procedures are threatened in two ways by the agency's arguments.

First, the agency would extend this Court's decision in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), to make immediately appealable by both parties all garden-variety remands where the district court finds on the record that further Social Security proceedings are needed. We do not want these remands to be immediately appealable. Most of our clients, pursuing a subsistence benefit, can ill afford fragmentation of their litigation into stages.

Second, the agency's arguments would end the district court's jurisdiction too early, at the time of remand orders that do not resolve the underlying question of entitlement to benefits. If the agency still denied benefits on remand, the claimant would have to file a separate civil action to come back to the court. The "second civil action" theory would multiply litigation, burdening our clients as well as the courts.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that when the district court remanded Mr. Schaefer's disability case for further administrative proceedings, the court retained jurisdiction to enter a later "final judgment" after the remand proceedings were completed. That judgment, after all appeal periods ran, would be the "final judgment" under the EAJA to trigger the 30-day filing period.

The agency disagrees, saying that the district court's remand order, by itself, was the EAJA "final judgment."

The agency's theory of "file now, prevail later" violates the EAJA and is based on a rigid reading of the dicta in *Melkonyan* that would overextend *Finkelstein* and gut *Hudson*. The underlying reading of § 405(g) would create difficult problems in Social Security practice, which we describe here.

NOSSCR requests the Court to limit the dicta in *Melkonyan* by holding that final judgments need to accompany only those remand orders that effectively end the litigation on the merits by resolving all of the issues properly raised in the complaint. *Hudson*, *Finkelstein*, and *Melkonyan* should be reconciled in a practical way that preserves the existing stable framework of judicial review in thousands of Social Security cases each year.

ARGUMENT

I. The language and purpose of the Equal Access to Justice Act make this fee application timely.

Forcing claimants to file fee applications shortly after fourth-sentence remands while the outcome of the disability claim is still within administrative discretion is inconsistent with Congress's intent in enacting 28 U.S.C. § 2412(d)(2)(G) (1985 Amendments to the EAJA). That section defines "final judgment" as one that is no longer appealable, thus protecting claimants from having to "tip their hands" by filing for fees before the merits are put to rest. Claimants should not be forced to signal that they intend to file for attorney fees against the agency while the agency is still considering their disability claims.

We agree with Respondent Schaefer's argument that the EAJA does not require filing fee applications before

becoming a "prevailing party." The agency's position, that protective applications must be filed which cannot be ruled upon until the claimant "fully" prevails by winning benefits on remand, is far-fetched and could not have been intended by Congress. We agree also with the narrower grounds for saving this application urged by Respondent Schaefer: Rule 58, equitable tolling, and nonretroactivity. None of these arguments will be repeated here.

II. Congress gave the district courts extensive jurisdiction in Social Security cases.

Virtually all Social Security litigation is brought under 42 U.S.C. § 405(g), the section of the Social Security Act providing for judicial review. Appendix 1. In enacting § 405(g) in 1939, Congress granted the district courts great power and flexibility to resolve Social Security cases. 53 Stat. 1362, 1368. Congress apparently chose the district courts because of the fact-intensive nature of individual Social Security cases.

The grant of power to the district courts was extensive by comparison with other statutes that allow judicial review of agency action. This Court has noted that § 405(g) places the courts virtually as coparticipants with the agency in decisionmaking. *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989). Congress expressly granted district courts the power to rewrite agency decisions by "modifying" them, effectively standing in the shoes of the agency.

Congress also expressly granted the discretion to remand to the agency for a rehearing, a power not expressly mentioned in many judicial-review statutes. Previously, where statutes were silent about the power to remand, a power to remand was implied from Congress's

expressly vesting in a court of equity the greater power to reverse the agency decision. *See, Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372 (1939).

III. The realities of Social Security litigation should be kept in mind.

In recent years, thousands of Social Security cases have been reviewed in federal courts annually. Most are about disability. The numbers ranged from a high of more than 20,000 cases filed each year during the early 1980s when the Administration attempted to cut off the benefits of many disability recipients, to a more manageable 7,398 cases filed in fiscal year 1991.[1]

The district courts handle Social Security cases by reviewing the pleadings, the administrative record, and cross-briefs, with occasional oral arguments. The cases are often heard by United States Magistrate Judges.

This system of judicial review reaches the merits of Social Security cases with minimum waste of time by the court and parties. The median EAJA attorney fee award is less than $3,000, *Pierce v. Underwood*, 487 U.S. 552, 563 (1988), indicating that claimants' attorneys spend fewer than 40 hours on this federal court litigation.

More complex cases like class actions, or *Finkelstein*-type cases where a regulation is invalidated by the court, are rare. Most remands present routine issues such as whether the evidence against disability was substantial,

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[1] 1992 Social Sec. Admin. Rep. to Congress 31. It is revealing that the agency, even after *Melkonyan*, excluded remands from "Final Court Decisions" in this report, n.1. All statistics from the year 1991 used in this section of our brief are taken from this report.

whether the agency gave proper weight to evidence, whether a vocational expert's testimony was needed, or whether the agency followed its regulations. Some cases bounce up and down between the court and the agency several times before resolution. *See, e.g., Bell v. Bowen*, 658 F. Supp. 533, 534-35 (C.D. Ill. 1987) (district court remanded twice, then reversed agency).

What happens to Social Security cases in court? Many claimants lose in court. 2,921 denials were upheld by the court in 1991. The court in those cases enters a final judgment affirming the agency's decision. A few actions are dismissed, either at the claimant's request or due to lack of jurisdiction. 606 actions were dismissed in 1991. The court in those cases enters a final judgment dismissing the civil action.

1,018 claimants won their claims in court in 1991. On entitlement cases, the court enters a final judgment reversing the agency's decision, and often orders a so-called "remand" for calculation and payment of benefits. *See, e.g., Reed v. Secretary of HHS*, 804 F. Supp. 914, 916 (E.D. Mich. 1992). We will refer to these remands as "dispositive" to distinguish them from "non-dispositive" remands, where the court remands without deciding about entitlement.

A larger group receives non-dispositive, "true" remands for further administrative proceedings on the entitlement issue. 2,526 claims were remanded by the courts in 1991. A few of these are at the request of the agency before it files its answer ("Secretary-motion" remands), and more are at the request of either party to take new evidence ("new-evidence" remands). The most common remands are "agency-error" remands such as Respondent Schaefer received: the court reviewed the

record, found error, believed that further agency proceedings were necessary, and remanded with instructions for a rehearing. In 1991, the agency awarded benefits in 69% of the court-remanded cases.

On these agency-error non-dispositive remands, some courts simply enter a remand order without more. Some say they are reversing and remanding for further proceedings, as in this case. Still others say they are reversing and remanding and enter a judgment or even a "final judgment."

Prior to *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991), it was clear that if judicial review was necessary after court remands, the case would be heard again in the same civil action, usually via a motion to reopen or to reinstate the case on the active docket. *See, e.g., Wilson v. Heckler*, 609 F. Supp. 120, 124 (W.D. Mo. 1985). Dicta in *Melkonyan* have caused some courts to doubt their jurisdiction to reopen the original case. *Frizzell v. Sullivan*, 937 F.2d 254 (5th Cir. 1991).

"Dispositive" and "agency-error" remands are under sentence four of § 405(g), and "Secretary-motion" and "new-evidence" are under sentence six. To complicate the matter, a single remand order can contain a combination of the types of remands, affirmances, reversals, modifications, and partly-favorable decisions on the various claims and time periods presented in a single civil action.

For example, a claimant may have three benefit applications pending: a disability insurance benefit (DIB) claim on her own earnings record, a disabled widow's claim on the decedent's record, and an SSI disability claim based on her poverty. Two time periods may be involved, before and after her 55th birthday. In one order, a court might affirm the denial of SSI benefits due to

excess income, reverse the denial of DIB benefits as of age 55 and remand for payment, remand the pre-age-55 DIB claim for further administrative proceedings due to agency error in not using a vocational expert where required by the regulations, and remand the disabled widow's claim to take new, previously unavailable evidence that the deceased wage earner had been fully insured.

Another reality of Social Security practice shown by the above example is that denial decisions on two or more distinct benefit claims typically are challenged in a single civil action for the sake of judicial economy. Many "concurrent" claims for different types of benefits are heard by the courts. Although § 405(g) could be read to imply a separate civil action for each final decision of the Secretary, no court has ever required separate civil actions in concurrent claims.

IV. The Secretary does not always comply with court remand orders.

The agency all too frequently violates the terms of court remand orders. Sometimes the district court must step in and exercise its jurisdiction before the remand proceedings are completed.[2] More often, the district court

[2] *E.g.*, *McKeever v. Heckler*, 595 F. Supp. 1131, 1132 (E.D. Wis. 1984) (despite the court's remand to the Secretary for further proceedings, an agent of the Secretary told plaintiff that he had previously been given three hearings, that his case was now officially closed and that it would not be reopened for any reason; the court ordered the Secretary within 10 days to schedule the new hearing, or face contempt proceedings); *Haire v. Bowen*, No. C-82-350-M (W.D.N.C., Charlotte Div. February 28, 1986) (17 months after remand, despite efforts of plaintiff's attorney, no hearing held or scheduied; court ordered Secretary to advise why Secretary should not be held in contempt); *Hinton v. Sullivan*, No. 84 Civ. 9276 (CES), 1991 U.S. Dist. LEXIS 8915 (S.D.N.Y. July 2, 1991) (court held the Secretary in civil contempt for not complying with a remand order requiring payment of interim benefits; the Secretary's employees had purposely entered "phony" information into plaintiff's computer record to prevent the computer from generating monthly checks to plaintiff).

finds on review of the results of the remand proceedings that the agency violated the express or implied terms of the remand order.[3]

[3] *E.g.*, *Valdez v. Schweiker*, 575 F. Supp. 1203 (D. Colo. 1983) (administrative law judge had refused to comply with district court's remand order requiring application of circuit precedent, district court threatened to use contempt powers if the agency refused to obey court remands in future cases); *Holst v. Bowen*, 637 F. Supp. 145 (E.D. Wash. 1986) (the ALJ erred in trying to overrule the district court's remand order); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (on remand for a different purpose, the administrative law judge changed his estimate of the claimant's work capacity from sedentary to light); *Skelton v. Bowen*, 668 F. Supp. 629, 631 (N.D. Ohio 1987) (agency on remand tried to "reshuffle the cards after the plaintiff was dealt a winning hand"); *Davis v. Secretary of HHS*, 634 F. Supp. 174 (E.D. Mich. 1986) (ALJ cannot change the finding about the claimant's residual functional capacity on remand, which was implicitly affirmed in the remand order); *Ramos v. Secretary of HEW*, 373 F. Supp. 260 (D.P.R. 1976) (court remanded the case a second time, after the agency failed to abide by the prior remand order); *Milazzo v. Schweiker*, 562 F. Supp. 1 (E.D. Pa. 1983) (reversal due to lack of explicit findings and development, despite prior remand); *Lucena v. Secretary of HHS*, 601 F. Supp. 168 (D.P.R. 1985) (remanded a second time for development of an adequate record); *Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967).

V. District courts have jurisdiction to enter "final judgments" after the agency completes its remand proceedings.

Respondent Schaefer won benefits on remand. The Eighth Circuit correctly held that the district court retained jurisdiction to enter a post-remand final judgment that would trigger the EAJA filing period. Such retained jurisdiction exists as a safeguard in a case where benefits are awarded on remand, and is vitally necessary where benefits are still denied. *See*, Section IV of this brief, above.

Statistically, as shown above, 60-70% of the claimants win on remand. However, where the claimant is denied (or partially denied) on remand, and seeks judicial review again, the issues in court often include whether the agency abided by the terms of the remand order and whether certain findings were implicit in the remand order so as to become the "law of the case." *E.g., Key v. Sullivan*, 925 F.2d 1056, 1060-63 (7th Cir. 1991); *Angevine v. Sullivan*, 881 F.2d 519, 522 (7th Cir. 1989); *Davis v. Secretary of HHS*, 634 F. Supp. 174 (E.D. Mich. 1986).

The agency does not consider the remanded case to be a new claim. The agency's regulations mandate different, streamlined procedures in determining disability after a court remand. 20 C.F.R. § 404.983-.984 (promulgated 1989). The claim goes to the top, not the bottom of the administrative hierarchy.

Those regulations about court remand cases were issued under the long-standing assumption that court jurisdiction continues during all court remands. As a result, the regulations are ambiguous about whether a claimant must exhaust the administrative step of filing exceptions with the agency's Appeals Council. 20 C.F.R.

§ 404.984(b) (you "may" file exceptions with the Appeals Council); *cf.*, 54 Fed. Reg. 37791 (September 13, 1989) ("because courts in most instances retain jurisdiction of civil actions when they remand them to the Secretary, we cannot bar a person's right to return to that court"). If the claimant does not file exceptions with the Appeals Council, no written document is issued marking the date on which the new administrative law judge decision becomes final. 20 C.F.R. § 404.984(d).

The agency's regulations about court remands call the new administrative decision the "final decision of the Secretary after remand." 20 C.F.R. § 404.984(b)(2), (d). The agency chose the terminology "final decision of the Secretary *after remand*" instead of "final decision of the Secretary" so as not to "mislead a claimant, whose case has been remanded by a court, into believing that the claimant must file a new civil action to obtain judicial review." 54 Fed. Reg. 37791 (September 13, 1989). The agency's position in this case contradicts its own regulations.

A. Historically district courts in Social Security cases have retained jurisdiction during all remands, with the full agreement of the Secretary, and have employed simple procedures to review the merits a second time if necessary.

"Generally, a remand order is an interlocutory order that does not divest a court of jurisdiction over the case." *Avery v. Secretary of HHS*, 762 F.2d 158, 163 (1st Cir. 1985); *Brown v. Secretary of HHS*, 747 F.2d 878, 884 (3d Cir. 1984) (the Secretary represented to the court that it would bring the results of *all* remands back to the court after remand proceedings were completed); *Wilson v. Heckler*, 609 F. Supp. 120 (W.D. Mo. 1985) (the Secretary successfully

sought dismissal of a second civil action filed by a Social Security claimant after court remand proceedings were finished; the Secretary conceded that the district court retained jurisdiction after the fourth-sentence remand).

The Secretary's informal practice before *Melkonyan* is described in *Wilson*, 609 F. Supp. at 123 n.2:

> When the additional proceedings in a post-decision remand case result in a decision favorable to the claimant, the Secretary sometimes merely files a request for dismissal, and sometimes files nothing at all – as this Court suggests today [citation omitted]. In cases wherein the decision on remand is partially favorable and partially unfavorable, it appears to be her practice to notify the claimant that he has 10 days within which to notify her if he desires to appeal. If so, she will prepare a supplemental transcript. If not, then again, either a motion to dismiss or nothing is filed.

Some district courts have issued standing orders regarding how post-remand district court review is to be handled in Social Security cases. For example, the magistrates in the Southern District of Ohio (Western Division) issued Magistrate's General Order No. 5 dated October 15, 1987. Paragraph 8 of that general order reads:

> If the District Court orders the case remanded to the Secretary for further proceedings, the case shall be closed upon the docket of the District Court. If plaintiff desires to challenge any decision of the Secretary that is issued after remand, plaintiff shall file a motion to reopen the case.

B. The general rule of administrative law is that courts remanding to an agency retain jurisdiction over the case.

Historically, remands to lower tribunals were ordered in aid of the court's jurisdiction, where the court needed to possess some information that the record did not provide before deciding the questions presented. *See, e.g., Estho v. Lear*, 7 Pet. 130, 131 (U.S. 1833) (Marshall, C.J.).

The equitable remand power was used to remand cases to administrative agencies while retaining jurisdiction. *See, Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372 (1939) (there was no doubt that if the N.L.R.B. did not comply with the court's remand order within a reasonable time, the court could vacate its order of remand).

Retention of jurisdiction is implied from the very fact that a court remands to an administrative agency. In *Druid Hills Civic Ass'n. v. Federal Highway Administration*, 833 F.2d 1545 (11th Cir. 1987), a citizen group challenged an environmental impact study by the government. The court remanded for further proceedings by the Secretary of Transportation. After the remand proceedings were completed, the citizen group opposed the district court's approval of the agency's new decision and findings, contending that the court had lost its jurisdiction over the case when it remanded back to the agency. The court of appeals held that the district court had continuing jurisdiction to approve the agency's findings after remand. The court of appeals stated that "the purpose of a remand order is to continue litigation rather than terminate it." *Druid Hills*, 833 F.2d at 1549.

C. The language of § 405(g) does not prevent the district court from retaining jurisdiction to enter a final judgment after "fourth-sentence" remand proceedings are finished.

Read as a whole, § 405(g) does not prevent a district court from delaying the entry of judgment after fourth-sentence remands. The text is ambiguous.

This Court has suggested that a judgment must be entered "with" a sentence-four remand. Admittedly "with" can mean "in conjunction with." *Finkelstein*, 496 U.S. at 629, *Melkonyan*, 111 S.Ct. at 2164, 2165. However, the word "with" in the fourth sentence of § 405(g)[4] can also mean "using," which allows the district court to delay its entry of judgment and retain jurisdiction. An example would be: "the court shall have power to enter a judgment with or without referring the matter to a master." "With" can be "used as a function word to indicate the means, cause, agent or instrumentality," as in "hit him with a rock." *Webster's Ninth New Collegiate Dictionary* 1355 (Merriam-Webster, 1988).

Finkelstein noted that sentence four is silent regarding post-remand judicial proceedings. *Finkelstein*, 496 U.S. at 626-27. Since post-remand judicial proceedings are mentioned after the semicolon in sentence six, it has been argued that the silence in sentence four is telling.

However, post-remand *administrative* proceedings are also mentioned after the semicolon in sentence six, but no one supposes that the silence in sentence four about post-

[4] "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

remand administrative proceedings enables the Secretary to ignore court remand orders. The remand proceedings, new findings, and new decision are identical in fourth- and sixth-sentence remands.

By contrast, Congress needed to use language in the 1984 Social Security Disability Benefits Reform Act to achieve the result that the agency now claims Congress had already chosen by silence in sentence four of § 405(g). The 1984 Reform Act required the courts to remand all cases that raised the "medical improvement" issue, and deemed the agency's decisions after the court remands to be new decisions, which "shall be subject to further . . . judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of [§ 405(g)]." Pub. L. No. 98-460, § 2(d)(4), 98 Stat. 1794.

Finkelstein further reasoned that the first sentence of § 405(g), stating that an individual may obtain judicial review of any final decision of the Secretary by filing "a civil action," suggests that "each final decision of the Secretary will be reviewable by a separate piece of litigation," thus making it unlikely that Congress intended post-remand judicial proceedings. *Finkelstein*, 496 U.S. at 625. However this textual suggestion proves too much. If each final decision must be challenged by a separate civil action, then the agency by issuing separate decisions on concurrent SSI and Disability Insurance Benefits claims could force the claimant to file multiple civil actions. 20 C.F.R. § 404.952 (administrative law judge has discretion whether to consolidate hearings on related claims, and whether to issue separate decisions).

It is unlikely that Congress intended to treat fourth- and sixth-sentence remands so differently. Congress explicitly chose to give the district courts continuing

jurisdiction after both types of sixth-sentence remands, "Secretary-motion-before-answer" and "new-evidence" remands. But the two kinds of remands described in sentence six are quite dissimilar.

In a Secretary-motion remand, the court never receives an administrative record and never makes any analysis of the proceedings below. In a "new-evidence" remand, the court reviews not only the new-evidence proper, but also must conduct an extensive review of the administrative record to decide whether the evidence is new, whether it is material, and whether good cause exists for its not appearing in the record earlier. The materiality requirement involves the court in a thorough analysis of the basis for the agency's decision, to see whether the new evidence might change the result. The court's review of the record makes new evidence remands similar to sentence-four remands, and quite unlike "Secretary-motion" remands.

Continuing court jurisdiction is more necessary with remands under sentence four than with remands under sentence six. In Secretary-motion remands, there is no adversity of interest between the parties, since the Secretary is not taking a position contrary to the claimant's in court. And in new-evidence remands, the positions of the parties are also not adverse. The addition of new material evidence to the record makes it a new case. The result may change without any implication that the Secretary was wrong originally.

In sentence-four remands, however, the court has reached the merits, found error and issued an order that is subject to continuing adversary interpretations by the parties. The need for continuing court jurisdiction after a finding of agency error may have been so obvious to Congress that the traditional continuing jurisdiction was

not explicitly stated in sentence four. Only sentence six, where the necessity of continuing court jurisdiction is much less obvious, needed an explicit statement of the post-remand remedies.

The unusual shared jurisdiction between court and agency in Social Security cases which was noted in *Sullivan v. Hudson* is more necessary after fourth-sentence than sixth-sentence remands. There is much more reason for district courts to serve "virtually as coparticipants with the agency" in decisionmaking on the claim after agency-error, fourth-sentence remands than after Secretary-motion remands and new-evidence remands.

The sixth-sentence requirement of the Secretary filing a new decision with the court, and the seventh-sentence requirement of post-remand judicial review, apply to fourth-sentence remands as well as sixth "by simple analogy." *Alexander v. Heckler*, 612 F. Supp. 272, 276 (D.R.I. 1985). It is difficult to imagine Congress covering Secretary-motion and new-evidence remands with the blanket of continuing court jurisdiction, while leaving agency-error remands out in the cold.

All of the language of § 405(g) discussed in this section was enacted in 1939. Congress in 1939 could have set aside a special class of remand orders, made them immediately appealable, and terminated the district court's jurisdiction. However, an innovation of this magnitude would likely have been made explicit in the language of § 405(g) rather than by inference, *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946), and the legislative history would likely have stated Congress's reasons for the experiment.

The legislative history of § 405(g) in 1939 gives no sign that such innovations were intended. The Congressional reports briefly stated that the judicial review was

intended to be similar to that over actions of other agencies. H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939).

D. Another section of the Social Security Act requires a post-remand judgment for its proper operation.

There is another section of the Social Security Act that presupposes that district courts have the very power to enter a post-remand judgment that the agency denies in this case. Denying post-remand jurisdiction in the district court would prevent the proper operation of the attorney fee section of the Social Security Act, 42 U.S.C. § 406(b). Appendix 2. That section was not examined in *Melkonyan* or *Finkelstein*. Section 406(b) presupposes the possibility of a judgment, by reason of which the claimant is entitled to past-due benefits at the end of each successful Social Security court case, as the basis for approving, the 25% contingent attorney fee. Unlike EAJA fees, the fees under § 406(b) are paid by the claimant out of past-due benefits.

A fourth-sentence remand does not itself entitle the claimant to any past-due benefits. Therefore, for § 406(b)(1) to work as intended, a judgment must be entered in the same civil action after the remand is successfully concluded. If no such judgment were possible, either the attorney could charge a completely unregulated fee or the attorney could never be paid for the services rendered in the district court obtaining the remand, depending on how § 406(b) were interpreted.

Neither interpretation of § 406(b) is plausible. Congress could not have intended to create this gaping hole. The Court should read § 405(g) in such a way as to harmonize with § 406(b)(1).

VI. There is no clear distinction between fourth- and sixth-sentence remands.

A great deal of litigation has occurred since *Melkonyan*, with the parties disagreeing about the characterization of remands in many of the cases. WESTLAW lists more than 180 cases citing *Melkonyan*, and we believe that more are not reported. Unfortunately, there are "gray areas" between fourth- and sixth-sentence remands which will continue to produce litigation so long as the procedural consequences of classification are different.

The first gray area between the remands is on Secretary-motion remands. The statute states that the Secretary could obtain such a remand "on motion before answer." If the Secretary delays the motion for remand until after answer, the Secretary can argue that it is no longer a sixth-sentence remand. Unfortunately, since this Court's decision in *Melkonyan* the Secretary has begun a pattern of waiting until after answer to request a remand and asking that the remand be characterized as fourth-sentence.

Surely, Congress did not intend for the Secretary to have the power to control whether a remand is pursuant to the fourth or sixth sentence of § 405(g) simply by the timing of the remand request. If so, the Secretary can decide whether the lifeline extended to claimants is a foot short. *See, Sullivan v. Hudson*, 490 U.S. at 890. The possibility that the Secretary can transform a sixth-sentence remand into a fourth-sentence remand suggests that Congress did not intend the two types of remands to have different consequences. Why would the Secretary ever move for remand before answering the complaint, if by delaying the filing the Secretary could terminate the district court's jurisdiction at the time of the remand and

argue that *Hudson*-type EAJA fees cannot be awarded for the services of plaintiff's attorney during the administrative proceedings on remand?

The distasteful possibility also arises that the agency could judge-shop by timing its remand motion. The agency could remove a Social Security case from the docket of a judge it did not like, merely by delaying filing its motion to remand until after answer.

There is also a gray area between new-evidence and agency-error remands. Much of the litigation since *Melkonyan* has been in this area. *See, e.g., Cummings v. Sullivan*, 950 F.2d 492 (7th Cir. 1991); *Damato v. Sullivan*, 945 F.2d 982 (7th Cir. 1991); *Petition of Thomason*, 777 F. Supp. 1277 (D.S.C. 1991).

Often the Secretary has a duty to develop certain evidence in the claim, put it in the record, or consider it. The duty may arise from caselaw holding that the burden of coming forward with evidence shifts to the agency after the claimant has proved a prima facie case of disability, from the Social Security Act,[5] or from the Secretary's own regulations.[6]

Where the Secretary has violated a duty to develop or consider certain evidence, the remanding court will

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[5] *E.g.*, 42 U.S.C. §§ 421(h) (in mental cases, the Secretary must have a report from a psychologist or psychiatrist), 423(d)(5)(B) (Secretary must develop a complete medical history of at least the preceding 12 months before denying disability, and must try to obtain necessary medical evidence from the claimant's treating physician before going to an outside source).

[6] *E.g.*, 20 C.F.R. §§ 404.951 (administrative law judge has duty to make a complete record of the hearing proceedings), 404.970(b) (the Appeals Council must evaluate new and material evidence submitted to it, if the evidence relates to the period adjudicated by the administrative law judge).

find error but also will "order additional evidence to be taken before the Secretary," § 405(g) (sixth sentence). Assuming that the evidence is both new and material, and that the Secretary's breach of duty can be "good cause for the failure to incorporate such evidence into the record in a prior proceeding," then the remand may meet the requirements of both sentence four (agency error found on review of record) and sentence six (new evidence).

The 1980 amendment to sentence six of § 405(g) did not affect this gray area between new-evidence and agency-error remands. The amendment restricted sixth-sentence new-evidence remands to cases where the new evidence was material and there was good cause for the failure to incorporate it into the record in a prior proceeding. § 307, Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (June 9, 1980). *See*, H.R. Rep. No. 96-100, 96th Cong., 1st Sess. 13 (1979) (amendment not intended to restrict any remands under sentence four).

It can be plausibly argued that many district court remands, like the one in this case, involve the "taking of new evidence." As a practical matter, even when a party proffers additional evidence to the court, the court will sometimes do a full review of the record to see whether the case can be reversed or modified without regard to the new evidence. If the court finds error in reviewing the record, there will often be a "hybrid" remand, both to correct error and to take the new evidence. *Key v. Sullivan*, 925 F.2d 1056 (7th Cir. 1991).

By contrast, there are very few remands that are purely and undeniably sixth-sentence new-evidence

remands. If an attorney brings new, previously unavailable evidence to court, either the evidence coincidentally became available during the short 60-day statute of limitations period for filing the civil action, or there must have been a colorable question of agency error even on the old record so the attorney filed the civil action before knowing about the new evidence. Claims of agency error and requests for new-evidence remands usually go together, and are hard to separate in practice.

NOSSCR requests the Court to treat both types of remand similarly so that this unproductive litigation over classification of remands can end. *Alexander v. Heckler*, 612 F. Supp. 272, 276 (D.R.I. 1985) (treat both types of remands the same procedurally, once their individual criteria are met); *see also Hensley v. Eckerhart*, 461 U.S. 424, 442 (1983) (Brennan, J., concurring in part and dissenting in part) (appeals from awards of attorney fees are one of the least socially productive types of litigation imaginable).

VII. More than one "final judgment" can be entered in a civil action.

We argue above that the district court is not required to enter a judgment at the time of a fourth-sentence remand order. Although that point is helpful to Respondent Schaefer's position, it is not necessary. Even if an appealable judgment must be entered, a later judgment, "final" for EAJA purposes, could also be entered when the litigation is truly finished.

As a general matter, "many final orders may issue" in the course of a single case, particularly where the court has granted "relief of an injunctive nature that must prove its efficacy only over a period of time." *White v.*

New Hampshire Department of Employment Security, 455 U.S. 696, 722-23 (1974) [citation omitted].

In addition, under the Federal Rules, multiple "judgments" may issue on the merits in a single case involving multiple claims, and each such judgment may be independently appealable as a final decision under 28 U.S.C. § 1291. Fed. R. Civ. P. 54(b); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1955).[7]

Under Rule 54(b), a complaint may give rise to separable claims "if 'different sorts of relief' are sought and, consequently, the claim for greater relief would be pressed even if the other claim were granted . . . When these features are present, claims may be considered separable even if they have arisen out of the same transaction or occurrence." *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987), *cert. denied* 483 U.S. 1021 (1987), quoting *Seatrain Shipbuilding Corp. v. Shell Oil Corp.*, 444 U.S. 572, 580-81 & n.18 (1980).

A court may issue an injunctive-type order on a claim that may be appealed as a final decision pursuant to Rule 54(b) and § 1291, while retaining jurisdiction to enter further orders with respect to either that claim or a related claim that may or may not be mooted by final disposition of the first claim. *See, e.g., Timberlake v. Oppenheimer & Co., Inc.*, 729 F.2d 515, 517 (7th Cir. 1984)

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[7] Fed. R. Civ. P. 54(b) provides in relevant part that "[w]hen more than one claim is presented in an action . . . the court may direct entry of a final judgment as to one or more but fewer than all of the claims . . . upon an express direction that there is no just reason for delay and upon an express direction for the entry of judgment." In *Melkonyan* this Court looked to Rule 54(a) in defining the term "final judgment" for EAJA purposes. 111 S.Ct. at 2161.

(order compelling arbitration is a final judgment under Section 1291 even though district court retains jurisdiction to enforce any subsequent arbitration award).

By analogy, multiple final judgments may be entered in Social Security cases if the Court holds that all fourth-sentence remands are appealable. A typical disability complaint arising under 42 U.S.C. § 405(g) effectively raises two related but distinct claims. The first seeks a remand for application of the standards required by law. The second seeks outright reversal of the Secretary's decision and a judgment that plaintiff is entitled to disability benefits as a matter of law.[8] Since § 405(g) itself vests discretion in the district court to order several remedies, and specifies no pleading requirements, any complaint brought under that statute invokes distinct claims for remand and reversal, unless narrower relief is requested in the complaint.

A request for a remand can be seen as a separate "claim" under § 405(g), distinct from the ultimate claim of entitlement to benefits. Numerous class actions have been filed pursuant to § 405(g) that sought *only* injunctive relief and rehearings for application of the proper legal standards. In such cases the claimants "neither [seek] nor [are] awarded benefits in the district court, but rather challenge[] the Secretary's failure to follow the applicable regulations," and if the district court agrees, the claimants are afforded rehearings under the corrected standards decreed by the court. *Bowen v. City of New York*, 476

[8] The complaint at issue in *Finkelstein* arguably presented *three* distinct claims: a claim for remand to correct legal errors committed in the individual case, a claim for outright entitlement to benefits, and a claim that the regulations used to deny benefits were invalid. *See* 496 U.S. at 622-24.

U.S. 467, 483, 485 (1986). Plaintiffs who obtain re-adjudications through such class actions have been held to satisfy the "prevailing party" requirement of the EAJA, because they obtained all they asked for in that action.[9]

VIII. The Secretary's grant of benefits to Mr. Schaefer on remand was a "settlement" upon which the district court could enter an order.

Under the EAJA, a "final judgment" means "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). The agency's favorable rehearing decision issued following a fourth-sentence remand is an implicit "settlement" of the entitlement claim that was not decided by the court. Plaintiff can return to the district court with the Secretary's final decision on his entitlement claim, and obtain an "order of settlement" on that claim. The district court under such circumstances retains at least the limited jurisdiction to enter a final, pro forma order on plaintiff's claim of entitlement to benefits.

IX. This Court's decision in *Sullivan v. Finkelstein* did not hold that all remands under sentence four are immediately appealable as "final decisions," nor that the district court forfeits all jurisdiction at that time.

The agency wants a holding that all fourth-sentence remands are immediately appealable, and by both

[9] *See, e.g., McDonald v. Sullivan*, 884 F.2d 1468, 1475 (1st Cir. 1989) (litigation which assured "some 10,000 members of the plaintiff class . . . that their disability status would be considered or reconsidered" under the appropriate standard constituted "a significant victory"); *Pirus v. Bowen*, 869 F.2d 536, 538 (9th Cir. 1989).

parties, because the EAJA statute of limitations begins only with a final judgment that is no longer "appealable." 28 U.S.C. § 2412(d)(2)(G).

Finkelstein decided that remand orders that invalidate regulations are appealable immediately by the agency as "final decisions," but carefully narrowed its holding. *Finkelstein* expressly reserved the key question, whether claimants (or even the agency) can immediately appeal all fourth-sentence remand orders.

Finkelstein stated that "the question before us . . . is whether orders of the type entered by the District Court in this case are immediately appealable by the Secretary." 496 U.S. at 623. The court noted the great variety of remands in administrative law. "In other cases the district court may order a remand to the agency, but the person seeking judicial relief may seek to appeal on the ground that broader relief should have been granted by the district court, *e.g., Bohms v. Gardner*, 381 F.2d 283 (C.A. 8, 1967), *cert. denied*, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed. 2d 1164 (1968). None of these situations is presented in this case, and we express no opinion about the appealability in those circumstances." *Sullivan v. Finkelstein*, 496 U.S. at 623 n.3.

Extending *Finkelstein* to make garden-variety fourth-sentence remands appealable would risk a flood of "protective" appeals and litigation over which issues had become *res judicata*. *Cf., Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 401 (5th Cir. 1984) (uncertainty causes precautionary appeals).

The general law of finality should be understood as a backdrop to *Finkelstein*. The classic statement about finality, the test of appealability, is from *Catlin v. United States*, 324 U.S. 229, 233 (1945): "A final decision generally is one

which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." This formulation suggests that the remand order in this case was not a final decision because it did not end the litigation on the merits, in any usual sense.

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of *what for practical purposes is a single controversy*, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) (Frankfurter, J.) [emphasis supplied]. Justice Frankfurter's formulation suggests non-appealability of the remand order that was entered in this case. The remand order was, for practical purposes, part of a single controversy brought to the district court by the claimant. A practical test is used.

Justice Frankfurter further wrote, "[t]he doctrine of finality is a phase of the distribution of authority within the judicial hierarchy." *Id.* at 330. Justice Frankfurter's observation is particularly useful in this case. Clearly, Congress in § 405(g) distributed the authority to the district courts rather than the courts of appeals. Allowing intermediate appeals of what are essentially interlocutory remands at the request of claimants or the agency would upset Congress's intended "distribution of authority within the judicial hierarchy."

Finkelstein used both a technical textual approach and a practical approach to the finality question. The Court

parsed § 405(g) to see whether its language could support finality for the type of remand entered in that case.

However, *Finkelstein* also went beyond the text of § 405(g), using a traditional pragmatic approach. *Finkelstein* noted that the government might never realistically have a chance to appeal what was in effect an invalidation of its regulation, and distinguished another Social Security case "which, quite unlike the present case, involved an appeal from a district court remand order that did 'no more than order clarification of the administrative decision.' " 496 U.S. at 628 n.8.

In ordinary circumstances, neither claimants nor the agency should be permitted to appeal "garden-variety" fourth-sentence remand orders. Such appeals would splinter Social Security litigation. The availability of such appeals could cause "precautionary" appeals to be filed, with litigation over which issues, not appealed, had become *res judicata*. Any mistake the district court made by remanding, instead of reversing or affirming, can be corrected on appeal at the end of the case after the remand proceedings are finished. The results of the remand proceedings may moot the appeal.

The court in *Finkelstein* also wisely reserved the question of whether judicial review after a fourth-sentence remand must be in a separate civil action, or can be in a new phase of the same civil action. *Finkelstein* stated that judicial review after a fourth-sentence remand is by a "separate piece of litigation," 496 U.S. at 625. "Separate piece of litigation" in the context of *Finkelstein* means a separate piece of litigation *for appealability purposes*. If the Court had meant "separate civil action," the Court would have said it.

Unless district courts have jurisdiction to enter "final judgments" after fourth-sentence remands, claimants will be forced to file second civil actions if they need additional judicial review. The "second civil action" theory would unnecessarily multiply litigation and paperwork, and would create vexing litigation over the timeliness of filing the second action. It would entwine the jurisdiction of the first judge to enforce the remand order with the jurisdiction of the second judge to hear the new challenge. "[T]he court that issues a mandate is normally the best judge of its content." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

Continuing jurisdiction in the same civil action is a necessary protection, given this agency's history of reluctant compliance with some court remand orders. *See* Section IV of this brief, above.

Historically the courts and the agency have rejected the "second civil action" theory. *Wilson*, 609 F. Supp. 120; *Brown*, 747 F.2d at 884. Now the agency has flip-flopped, apparently in hopes of finding a way around this Court's decision in *Sullivan v. Hudson* by prematurely ending the civil action for which EAJA fees may be paid.

The Eighth Circuit correctly rejected the agency's fee-driven attempt to splinter Social Security litigation.

CONCLUSION

We request the Court to affirm the Eighth Circuit's finding that the EAJA fee application in this case was timely. Further, we request the Court to clarify that district courts retain jurisdiction during all non-dispositive remands, that non-dispositive remands are not ordinarily immediately appealable, and that claimants do not need to file second civil actions if they are still denied benefits after court remands.

Respectfully submitted,

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STATUTORY APPENDIX

42 U.S.C. § 405(g) [sentence numbering in brackets supplied]:

Judicial review. [1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a)

hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. § 406(b):

(1) Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of

the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 205(i) [42 USCS § 405(i)], certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.